



## PUEBLO OF SAN FELIPE

187 IBLA 342

Decided May 5, 2016



United States Department of the Interior  
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Interior Board of Land Appeals  
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PUEBLO OF SAN FELIPE

IBLA 2016-129

Decided May 5, 2016

Appeal from a February 18, 2016, decision issued by the Bureau of Land Management, wherein the agency denied a protest that challenged the agency's proposed decision to issue a permit for fossil excavation on public lands. 1162.

Petition for a Stay Granted.

1. Rules of Practice: Appeals: Motions;  
Rules of Practice: Appeals: Stay

To prevail on a petition for stay, the petitioner must convince the Board that (1) the potential injury it will suffer if we deny the stay is greater than the potential injury to BLM if we grant it; (2) it is likely to prevail on the merits; (3) it will likely suffer immediate and irreparable harm if a stay is not granted; and (4) the public interest favors granting a stay. The petitioner does not need to prove with certainty each criterion. Instead, a petitioner must show that it likely meets each criterion.

2. Rules of Practice: Appeals: Motions;  
Rules of Practice: Appeals: Stay

The Board's review of a stay petition is preliminary in nature and necessarily more cursory than a full review on the merits. Thus, our analysis contained in our Orders disposing of a stay petition may change upon adjudication on the merits of the appeal at a later stage in the proceedings.

APPEARANCES: Michael T. Sandoval, Governor, San Felipe Pueblo, New Mexico, for appellant; Benjamin Vaccaro, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Bureau of Land Management.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE JONES

Summary

A Federally-recognized Tribe disputes the excavation of 40-million-year-old fossils on Federal land. The Tribe believes the fossils are integral to their cultural heritage and wants to prevent the excavation. Therefore, the Tribe has moved the Board to stay any excavation until its appeal is resolved. Because the Tribe has shown that the potential injury it will suffer if we deny the stay is greater than the potential injury if we grant it, that it has a reasonable basis for challenging the legal soundness of the decision, that it will likely suffer immediate and irreparable harm if a stay is not granted, and that the public interest favors the granting of a stay, we grant its petition for a stay.

*How a Federal Agency Decided to Permit Excavation of  
Mammalian Fossils on Public Land*

The Bureau of Land Management (BLM) intends to allow excavation of fossils embedded within public lands. The fossil material is from a Brontotheres, extinct, medium-sized hooved mammals that resemble rhinoceroses.<sup>1</sup> The fossil bones are very fragile and easily break apart when they are exposed to the earth's surface environment.<sup>2</sup> The Pueblo of San Felipe, a Tribal Nation recognized by the Federal government, appeals BLM's decision to deny the Pueblo's protest in which it challenged BLM's proposed decision to permit fossil extraction. The Pueblo considers the affected public lands to be a part of its aboriginal homeland. The Pueblo states the area should be protected, not excavated.

The Pueblo notified BLM that it identified many important cultural resources in the area slated for excavation.<sup>3</sup> The Pueblo informed BLM that it views the lands, and the fossils, as culturally important and therefore protected by the Native American Graves Protection and Repatriation Act.<sup>4</sup> Under that Act, an object possesses cultural patrimony when a tribe acknowledges the object's ongoing historical, traditional, or cultural importance.

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<sup>1</sup> See Administrative Record (AR) Tab 6 at 1608.

<sup>2</sup> *Id.*

<sup>3</sup> AR Tab 2 at 13-14.

<sup>4</sup> 25 U.S.C. §§ 3001-3013 (2012); see AR Tab 3 at 445-46.

The New Mexico Museum of Natural History and Science, partnering with the University of New Mexico, filed with BLM an application for a paleontological excavation permit to extract the fossils.<sup>5</sup> In response to the Museum's application, BLM prepared an Environmental Assessment, in compliance with the regulations implementing the National Environmental Policy Act.<sup>6</sup> In the Environmental Assessment, BLM analyzed how the "proposed action" for excavation and a "no action alternative" of not excavating the relics would affect the surrounding environment.<sup>7</sup> BLM determined that the Pueblo did not identify any cultural resources within the proposed project area.<sup>8</sup> Therefore, on February 4, 2015, BLM issued a proposed decision to grant the Museum a 3-year paleontological excavation permit.<sup>9</sup>

The Pueblo protested BLM's proposed decision on February 26, 2015.<sup>10</sup> The Pueblo requested BLM to consult with it. The Pueblo also wanted BLM to consider an on-site study of the fossils as a viable alternative to the proposed action.<sup>11</sup> While BLM and the Pueblo periodically discussed the matter over the next year, there was no resolution.

On February 18, 2016, BLM denied the Pueblo's protest. BLM determined that the fossil bed is not subject to protection under the Native American Graves Protection and Repatriation Act because it does not contain objects of cultural patrimony.<sup>12</sup> BLM stated that the Pueblo did not present any evidence that proved the fossil bed has cultural affiliation or is tribally owned.<sup>13</sup> BLM also concluded that study of the fossils onsite was not feasible because any exposed material would be at risk of erosion. Thus, the fossils would have to be extracted from the land.<sup>14</sup> BLM indicated they would issue the permit to the Museum.<sup>15</sup> The Pueblo appealed.

The Pueblo seeks to stay implementation of BLM's decision until the Board renders a final decision.

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<sup>5</sup> See AR Tab 1 at 1-5.

<sup>6</sup> 42 U.S.C. §§ 4321-4370h (2012); 40 C.F.R. Parts 1500-1508 and 43 C.F.R. Part 46.

<sup>7</sup> See AR Tab 6 at 1601-1610.

<sup>8</sup> *Id.* at 1615.

<sup>9</sup> *Id.* at 1612.

<sup>10</sup> AR Tab 7 at 1623-27.

<sup>11</sup> *Id.* at 1623-27.

<sup>12</sup> AR Tab 8 at 1636, 1659.

<sup>13</sup> *Id.* at 1636.

<sup>14</sup> *Id.* at 1639.

<sup>15</sup> *Id.* at 1640.

*We Grant Appellant's Petition for Stay*

[1] The Pueblo has met the requisite elements for a stay. To prevail on a stay petition, the petitioner must convince us that four factors are present:<sup>16</sup> (1) that the potential injury it will suffer if we deny the stay is greater than the potential injury to BLM if we grant the stay; (2) that it is likely to prevail on the merits; (3) that it will likely suffer immediate and irreparable harm if a stay is not granted; and (4) that the public interest favors granting a stay.<sup>17</sup> The petitioner does not need to prove with certainty each criterion. Instead, a petitioner must show that it likely meets each criterion.<sup>18</sup>

[2] As in this appeal, a stay petition is typically filed at an early, preliminary stage of the proceeding. As such, the Board's review is preliminary in nature and necessarily more cursory than a full review of the case once it becomes ripe for final disposition on the merits. Also at this early stage of proceedings, subsequent events and additional arguments presented may alter the Board's view of the evidence. For example, in the future, the parties may more fully present their case, and the Board may request further briefing or evidence and grant inclusion of additional parties. Thus, our analysis of the four elements is in the context of the factors that limit our review at this preliminary stage of the proceedings, and are subject to change upon adjudication of the merits of the appeal at a later stage in the proceedings.

*A. The Potential Injury the Pueblo Will Suffer if We Deny the Stay  
is Greater than the Potential Injury to BLM if We Grant It*

The harm the Pueblo would incur if we do not grant a stay exceeds the harm BLM would incur if we deny a stay. If implemented, the decision at issue would allow BLM to permit sub-surface excavation of the underlying bone bed.<sup>19</sup> Should the Pueblo prevail on the merits of its appeal after the Museum has excavated culturally-significant material, there would be nothing left to protect.

We understand BLM believes that the fossils are in danger of eroding, which would diminish their scientific value. But given the severity and irreparable potential

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<sup>16</sup> See 58 Fed. Reg. 4939, 4941 (Jan. 19, 1993) (Preamble to final rule promulgating 43 C.F.R. § 4.21); see also *Oregon Natural Resources Council Action*, 148 IBLA 186, 188 (1999).

<sup>17</sup> See 43 C.F.R. § 4.21(b); see also *Vulcan Power Co.*, 178 IBLA 210, 214 (2009).

<sup>18</sup> See, e.g., *Jan Wroncy*, 124 IBLA 150, 151-52 (1992).

<sup>19</sup> See AR Tab 1 at 2.

harm to the Pueblo, on balance the Pueblo has convinced us the first factor weighs in its favor.<sup>20</sup>

*B. The Pueblo Will Likely Succeed on the Merits*

An appellant seeking a stay must show that it is likely to succeed on appeal. However, an appellant does not need to demonstrate that its probability of success on the merits is free from doubt. Instead, an appellant need only present a reasonable basis for challenging the legal or factual soundness of the agency's decision.<sup>21</sup> An appellant will meet this factor if it raises material concerns that can only be comprehensively addressed after more thorough review of both the administrative record and the parties' additional briefing.

Upon review of the record, we find in favor of the Pueblo on the second factor. In particular, we are persuaded by the Pueblo's argument that BLM failed to consider reasonable alternatives to excavating the fossils and removing them offsite.<sup>22</sup> BLM does not refute the Pueblo's argument.<sup>23</sup> Because the Pueblo has raised material arguments that cannot be carefully considered within the time constraints set forth in 43 C.F.R. § 4.21, and because we are not persuaded at this stage in the proceedings that BLM adequately analyzed a reasonable range of alternatives to the proposed action in its Environmental Assessment, the Pueblo has demonstrated a likelihood of success in its appeal.

Again, at this stage of the proceedings it is impossible to know with certainty which party will ultimately prevail – that ultimate question rests with the Board at a later date. But we can tell at this stage that a stay is warranted under this factor because the Pueblo has raised issues involving material legal and factual concerns about BLM's decision. A more deliberative investigation of the evidence and basis for BLM's decision is in order, and maintaining the status quo to allow that deliberative process to proceed is appropriate under this factor.

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<sup>20</sup> See BLM's Response at 15.

<sup>21</sup> See, e.g., *Jan Wroncy*, 124 IBLA at 151-52.

<sup>22</sup> See Petition at unpaginated (unp). 3.

<sup>23</sup> See Response at 15-19.

*C. The Pueblo Will Likely Suffer Immediate and Irreparable Harm if a Stay is Not Granted*

For the reasons discussed under the first factor, we find the Pueblo has demonstrated that it will suffer immediate and irreparable harm in the absence of a stay. In reaching this conclusion, we are persuaded by the Pueblo's belief that excavation will permanently extinguish a significant part of its history, culture, and spiritual way of life.<sup>24</sup> We defer to the Pueblo's knowledge of its own culture and context in which the fossils and lands are culturally important to it. Therefore, under the circumstances presented at this preliminary stage, we find that the Pueblo has demonstrated a clear threat of immediate and irreparable harm, and denying its stay petition would permit BLM to engage in that harmful activity.

*D. The Public Interest Favors Granting a Stay*

On balance, consideration of the public interest in granting or denying a stay also favors the Pueblo. The mammalian fossils are of interest not only to the Pueblo and its associated tribes,<sup>25</sup> but also to the larger public, as evidenced by the Museum's interest in excavation. We take official notice<sup>26</sup> that 40-million-year-old fossils often invoke the public interest due to their historical, educational, and scientific value. A stay will preserve these resources in place for both the public and the Pueblo until the Board can fully analyze the basis for BLM's decision.

*Conclusion*

We find that the Pueblo has shown the four factors exist for the Board to grant its stay petition. Because the Pueblo has made such a showing, we will maintain the status quo during the administrative process.

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<sup>24</sup> See Petition at unp. 4.

<sup>25</sup> AR Tab 6 at 1601.

<sup>26</sup> 43 C.F.R. § 4.24(b).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we grant the Pueblo's stay petition.

\_\_\_\_\_/s/\_\_\_\_\_  
Eileen Jones  
Chief Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Deputy Chief Administrative Judge